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**CONFIDENTIAL ATTORNEY/CLIENT  
PRIVILEGED COMMUNICATION**

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To: Schools Legal Service Clients  
From: Grant Herndon *GH*  
Re: Update on Immigration Issues Impacting School Districts

**INTRODUCTION**

There has been a great deal of discussion, both during the Presidential campaign and in the wake of recent Executive Orders, relating to enforcement of immigration laws and the potential for disruption to the education of undocumented students and their safety in the event undocumented family members are apprehended and/or deported. There are also concerns about potential bullying and harassment of students based on immigration status.

Many districts are seeking to provide assurance and comfort to their students and families by adopting what has been referred to as a "safe haven" resolution. The resolution language varies from conveying a district's support for its students and families and pledging that the education environment will be a safe and stable place for them, to language which states or implies outright defiance of enforcement actions by ICE.

The purpose of this memorandum is to provide you with background on some of the issues, while recognizing that this is a developing area subject to continuing change with the new administration.

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agencies since 1976.

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As you know, federal law prohibits states from denying any student a public education based on immigration status.<sup>1</sup> All students are permitted (and required) to attend school, free from discrimination, harassment, and bullying based on their national origin.<sup>2</sup>

From a legal perspective, immigration is almost entirely a matter of federal law and subject to the jurisdiction of federal authorities.<sup>3</sup> Within the Executive Branch, the Department of Homeland Security is responsible for administration of immigration laws. Its Immigration and Customs Enforcement (ICE) agency is a federal law enforcement agency which focuses on homeland security investigations and immigration enforcement/removal actions.

### **WHAT IF WE ARE REQUESTED TO PROVIDE RECORDS PERTAINING TO UNDOCUMENTED STUDENTS?**

Districts normally do not (and should not) request proof of immigration status when admitting students to school, with the exception of some students who attend under non-immigrant visas. In limited instances, districts may collect some data used to determine eligibility for other programs which could be an indicator of immigration status. Districts may wish to review enrollment-related forms to ensure unnecessary information is not being collected.

Federal and state student privacy laws (the Family Education Privacy Rights Act and California Education Code section 49070 and following) require districts to protect the confidentiality of student records. As with any other request for student records, documents relating to the immigration status of undocumented students should not be turned over voluntarily without the consent of the parent or adult student. However, federal agencies such as ICE can access "directory information" concerning students to the extent authorized in District policy. Districts

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<sup>1</sup> *Plyler v. Doe* (1982) 457 U.S. 202.

<sup>2</sup> While this memorandum does not address in depth the potential harassment/bullying issues, districts should certainly promptly follow up on any reports of suspected harassment or bullying, including those related to a student's national origin or citizenship status, or that of the student's parents, and ensure that staff are adequately trained in district policy on those issues. A group of Kern County attorneys known as the Immigration Justice Collaborative recently sent a letter to Kern County school principals reminding them of their obligations concerning responses to bullying, asserting the possibility of legal action for failure to properly respond to such situations, against not only school districts but also principals, teachers and "any other involved school personnel." (Letter to School Principals dated March 14, 2017.)

<sup>3</sup> Article I, Section 8, of the United States Constitution entrusts the federal legislative branch with the power to "establish a uniform Rule of Naturalization."

concerned about even the release of directory information may want to review their policies and make parents aware of “opt-out” provisions. In addition, confidential student records must be turned over in response to a valid court order or subpoena.

Your sites should be reminded of the protocols concerning student records and directory information. If a federal agency is seeking confidential student records, the request should immediately be referred to the District Office for further handling and consultation with legal counsel. In most instances, notice should be provided to the parents.<sup>4</sup>

### **HAS THE LAW CHANGED WITH THE NEW ADMINISTRATION?**

The change in policy is not the result of Congressional action to amend the Immigration and Nationality Act. Executive Orders issued by the President in late January direct ICE to enforce existing immigration laws and signal enforcement priorities and practices different from those of the prior administration.<sup>5</sup> The Department of Homeland Security followed up on the Executive Orders with memoranda withdrawing some previous guidance and implementing the Executive Orders.<sup>6</sup>

Among other things, the orders call for a series of measures that could impact local agencies such as school and community college districts, including those that declare themselves a “sanctuary jurisdiction” which wilfully refuse to comply with a particular federal statute. Such agencies may be cut off from eligibility for federal grants and are subject to “appropriate enforcement action.” The statute in question bars local and state governments and agencies from enacting laws or policies that prohibit or restrict an agency or official’s ability to communicate with the Department of Homeland Security about “information regarding the immigration or citizenship status” of individuals.<sup>7</sup> The enforcement action can also extend to any entity which “has in effect a statute, policy or practice that prevents or hinders the enforcement of Federal law.”

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<sup>4</sup> 34 Code of Federal Regulations section 99.31.

<sup>5</sup> See Executive Orders dated January 25, 2017, entitled *Enhancing Public Safety in the Interior of the United States and Border Security and Immigration Enforcement Improvements*.

<sup>6</sup> See Homeland Security Memoranda dated February 20, 2017, regarding *Enforcement of the Immigration Laws to Serve the National Interest and Implementing the President’s Border Security and Immigration Enforcement Improvements Policies*.

<sup>7</sup> See, 8 United States Code section 1373.



It is not clear at this time how this language in the Executive Orders and the federal statute will ultimately be enforced in the school and community college district context. While it could be argued that a policy refusing to provide school records absent a court order is in conflict with the law discussed above (which prohibits restrictions on an agency's ability to communicate with federal authorities regarding immigration or citizen status), federal law *also* requires districts to protect student records (and disclosure of information from such records). It is unlikely that lawful compliance with FERPA requirements would be considered a practice that hinders the enforcement of federal law.

### **WILL ICE BEGIN TO CONDUCT ROUTINE ENFORCEMENT OF IMMIGRATION VIOLATIONS IN SCHOOLS AND COMMUNITY COLLEGES?**

In an October 24, 2011, memo from ICE entitled "Enforcement Actions at or Focused on Sensitive Locations," ICE agents were directed that any planned enforcement action (arrests, interviews, searches and surveillance) must not take place at "sensitive locations" (defined to include preschools, elementary and secondary schools, post-secondary schools and vocational schools) without prior approval of specified high level officials or exigent circumstances such as pursuit of a felon, imminent danger of harm to person or property, etc.

Despite the recent Executive Orders and resulting implementing memoranda which make clear that ICE will no longer exempt classes or categories of "removable aliens" from enforcement, according to a Q&A issued by the Department of Homeland Security, "the sensitive location guidance remains in effect. . . ."<sup>8</sup> For now, it appears that schools and community colleges will remain places where routine immigration enforcement actions will not be carried out. The memoranda confirm that the Deferred Action for Childhood Arrivals (DACA) program also remains in place.<sup>9</sup>

A Los Angeles-based ICE official confirms that the agency's position continues to be that enforcement actions need to be kept away from school and community college sites with very

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<sup>8</sup> See Q&A: *DHS Implementation of the Executive Order on Border Security and Immigration Enforcement*, release date February 21, 2017, revised March 2, 2017, Q 26 (this can be found at the following link: <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement>)

<sup>9</sup> This program defers formal removal proceedings for certain undocumented immigrants who entered the U.S. as minors prior to June 2007.

limited exceptions, such as where a crime is in progress, and that any contacts with schools will be handled as discretely as possible. It should be recognized that this guidance could be withdrawn in the future. Under existing law, ICE actually has the right to interrogate "any alien or person believed to be an alien as to his right to be or to remain in the United States" without a warrant and to arrest undocumented persons, normally with a warrant but sometimes without one in certain exigent circumstances.<sup>10</sup> (When ICE is in pursuit of a particular person, in almost every instance they will have an administrative warrant.)

### **SHOULD SITE ADMINISTRATORS PROVIDE ICE ACCESS TO STUDENTS OR OTHERS ON CAMPUS?**

As with any other law enforcement agent coming onto a campus or requesting access to an individual, and in light of the "sensitive locations" directive, school site officials will want to do the following (as modified by any directives from the District Office):

- ✓ Explain to the agent that the District has a protocol to process law enforcement requests for access to District personnel or students
- ✓ Notify the appropriate contact at the District Office as soon as possible. The District Office may provide further direction.
- ✓ Ascertain the identity and credentials of the official, including any badge and/or ID number
- ✓ If the agent or official does not present a valid ID or badge, the site administrator should contact the law enforcement agency for confirmation of the agent's status. Ask for contact information for the agent's supervisor.
- ✓ Attempt to ascertain the agent's authority and purpose in wanting to speak with, detain, or apprehend someone on campus.
- ✓ Request and, if possible, copy any warrant, court order, or, in the case of minor students, evidence of parent consent. If possible, forward these to the District Office for evaluation and direction.
- ✓ If the agent provides valid identification and insists on conducting an interview without documentation of a court order, warrant, or if applicable, evidence of parent consent,

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<sup>10</sup> 8 United States Code section 1357(a)(1).

- attempt to ascertain whether the agent is acting pursuant to "exigent circumstances," and document the response.
- ✓ In the case of a student, notify the parents of the contact, absent a directive by the agent not to do so. Document any such directive.
  - ✓ Where the decision has been made to permit the interview, in the case of a minor student, ask whether an adult can be present with the student for the interview. (Note: some districts are considering a policy requiring written permission of the Superintendent before such access will be permitted).
  - ✓ Do not attempt to physically interfere with any enforcement action.
  - ✓ Document the time and circumstances of the contact.

The immigration official we spoke with indicated that in most instances, an ICE official directed by a school site to wait for permission from the Superintendent would likely attempt to accommodate the request, while at the same time obtaining further direction from their own superior. Again, however, there could be rare instances where the officer is carrying out an enforcement action under exigent circumstances. In such cases, as with any other law enforcement officer, it may be a criminal offense for a school official to resist a demand for access to a student or other person on campus, assuming proper identification and credentials have been provided and the agent has asserted that he or she has authority to obtain the access due to exigent circumstances.

### **WHAT IS THE PURPOSE OF A SAFE HAVEN RESOLUTION?**

The State Superintendent of Public Instruction has encouraged districts to join him in declaring public schools as "safe havens" for students and their parents in the sense of letting parents know they are welcome on school campuses regardless of their immigration status, are encouraged to participate in their child's education, and to remind them of existing laws that protect them and their student's records.<sup>11</sup>

Nevertheless, some resolutions under consideration appear to go beyond these assurances to families and include language which could be interpreted as intending to ignore or even defy

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<sup>11</sup> See December 21, 2016, bulletin entitled, *Public Schools Remain Safe Havens for California's Students*, posted on the CDE website.

federal law. Districts should carefully review the wording in any “safe haven” resolution under consideration for Board approval, in particular language dealing with access to documents and students. To the extent such resolutions can be interpreted as hindering the enforcement of federal immigration law, they may prove problematic for districts in the future.

A resolution can generally be written to make clear the District will comply with applicable law, while at the same time conveying that student data will not voluntarily be given up and assuring families of the District’s concern that all students benefit from a stable and secure educational environment. Our office is available to review and comment on sample resolutions.

The California School Boards Association recently published a sample resolution along with a bulletin containing helpful information entitled “Legal Guidance: Providing All Children Equal Access to Education, Regardless of Immigration Status.” CSBA has also recently updated its Board Policy 5111 (Admission) to confirm that districts shall not request documentation of or deny enrollment based on immigration status. The policy goes on to state that information about a student or parents’ immigration status must not be shared without parent consent or as otherwise authorized by law.

The National School Boards Association has also issued a helpful publication entitled *Lifting the Lamp Beside the School House Door, A Legal Guide to Serving Undocumented Students in Public Schools*.

## CALIFORNIA LAW AND PENDING LEGISLATION

Existing California laws address the question of cooperation between federal and state authorities concerning immigration enforcement and additional bills are now being proposed.

California law prohibits local law enforcement officials from detaining individuals on the basis of an ICE hold after becoming eligible for release from custody, except in certain circumstances. Further, AB 2792, signed into law on September 28, 2016, further requires local law enforcement agencies to furnish a written consent form prior to any interview by ICE of individuals in custody. Agencies which provide ICE access to an individual are required to hold a public community forum to provide information to the public about ICE’s access to



individuals.<sup>12</sup> It is not yet known whether some of these laws may be challenged by the new Presidential administration.

Senate Bill 54 (De Leon) would apply to state and local law enforcement, including "school police or security departments," defined to include security departments of a school or community college district or county office of education. The bill would prohibit the use of personnel or resources to investigate, interrogate, detain or arrest an individual for immigration enforcement purposes. This includes a prohibition on responding to requests for "nonpublicly available personal information" about a person such as his or her home or work address. It calls for the Attorney General to publish model policies limiting assistance with immigration enforcement to the fullest extent possible under the law, which "public schools" would be required to implement.<sup>13</sup>

## **CONCLUSION**

Districts are quite understandably concerned about the impact of a change in immigration enforcement practices on the learning environment for their students. Some of these changes could potentially result in painful situations for families. Many districts are doing all they can to provide comfort and support for families facing uncertainty.

As discussed, for the moment at least, it appears to be the continuing policy of the federal government that routine enforcement actions on a school or community college site will be extremely rare, and that any contact will most likely relate to targeted criminal investigations.

At the same time, district officials need to be aware that immigration officials are federal law enforcement officers. Resisting their lawful authority may carry criminal consequences in the unlikely event of a confrontation.

We are continuing to monitor the situation. Should you have any questions or if you would like us to review a sample policy or resolution, don't hesitate to call on us.

GH/cp

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<sup>12</sup> See Government Code sections 7282 and following and 7283 and following.

<sup>13</sup> There are a number of potential legal issues with this bill. We are monitoring its progress.